

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES PAUL ENNIS,

Defendant-Appellant.

UNPUBLISHED

January 27, 2005

No. 250511

Genesee Circuit Court

LC No. 03-011711-FC

Before: Hoekstra, P.J., and Cavanagh and Borrello, JJ.

PER CURIAM.

Defendant was charged with one count of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a). Following a jury trial, defendant was acquitted of the first-degree CSC charge and convicted of second-degree CSC, for which he was sentenced to a prison term of four to fifteen years. Defendant appeals as of right. We affirm but remand for correction of the presentence report. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first claims error with respect to the victim's testimony that defendant used drugs, such evidence being inadmissible under MRE 404(b). To the extent defendant predicates error on prosecutor misconduct, the issue has not been preserved because defendant did not object at trial. Therefore, review is precluded unless defendant establishes plain error that affected the outcome of the trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). To the extent defendant predicates error on ineffective assistance of counsel, defendant failed to raise this claim below in a motion for a new trial or an evidentiary hearing and thus our review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

Defendant's substance abuse was irrelevant to the issues to be determined at trial and it was not admissible under MRE 404(b)(1). However, it appears from the record that the victim volunteered the information in response to an otherwise proper question concerning her living arrangements. Prosecutorial misconduct cannot be predicated on good-faith efforts to introduce admissible evidence. *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999). In addition, an unresponsive answer to a proper question is not usually error, *People v Measles*, 59 Mich App 641, 643; 230 NW2d 10 (1975), and does not provide a basis for relief despite the mention of some inappropriate subject matter unless there is some evidence that the prosecutor conspired with or encouraged the witness to give the testimony at issue. *People v Griffin*, 235

Mich App 27, 36; 597 NW2d 176 (1999); *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). There is no such evidence in the record. Moreover, “where a curative instruction could have alleviated any prejudice effect” from the evidence at issue, this Court “will not find error requiring reversal.” *Ackerman, supra* at 449. A cautionary instruction is sufficient to remove taint caused by a volunteered remark about other crimes committed by the defendant. *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988). Accordingly, we find that defendant has failed to establish a right to relief on the ground of prosecutorial misconduct.

Assuming trial counsel was ineffective for failing to object to the remark about defendant’s drug abuse, defendant is not entitled to relief unless he also shows that he was prejudiced by the error. *People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001), *aff’d* 468 Mich 233 (2003). Given that defendant’s substance abuse was never mentioned again and that the jury acquitted defendant of the more serious offense despite the mention of defendant’s substance abuse, it is unlikely that the evidence affected the outcome of the trial. Accordingly, we find that defendant has failed to establish a right to relief on the ground of ineffective assistance of counsel.

Defendant next contends that trial counsel was ineffective for failing to impeach the victim with her inconsistent testimony from the preliminary examination. As with the first issue, defendant failed to raise this claim below in a motion for a new trial or an evidentiary hearing and thus our review is limited to the existing record. *Snider, supra*.

The record shows that trial counsel impeached the victim with inconsistencies between her trial testimony and prior statements to police, but did not question her about any inconsistencies between her trial testimony and her preliminary examination testimony. The decision whether to question or cross-examine witnesses is presumed to be a matter of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999); *People v Hopson*, 178 Mich App 406, 412; 444 NW2d 167 (1989). “This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel’s competence with the benefit of hindsight.” *Rockey, supra* at 76-77. Given that it is not clear from the preliminary examination transcript that the victim’s testimony was in fact contrary to her trial testimony, plus the fact that trial counsel had already impeached the victim to some extent, it does not appear that counsel’s failure to address this matter would have so seriously undermined the victim’s testimony that the outcome of the trial likely would have been different. *Hopson, supra*; *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Accordingly, we find that defendant has failed to establish a right to relief.

Defendant next contends that he is entitled to resentencing or amendment of the presentence report. Defendant preserved this issue by raising it at sentencing. MCR 6.429(C).

The sentencing court’s response to a claim of inaccuracies in the presentence report is reviewed for an abuse of discretion. *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003). A defendant has a “due process right to be sentenced on the basis of accurate information.” *People v Mitchell*, 454 Mich 145, 173; 560 NW2d 600 (1997). A presentence report is presumed accurate unless effectively challenged by the defendant. *People v Grant*, 455 Mich 221, 233; 565 NW2d 389 (1997); *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003). The defendant may challenge “the accuracy or relevancy of any information

contained in the presentence investigation report.” MCL 771.14(6). Once the defendant raises an effective challenge, the prosecution must prove by a preponderance of the evidence that the facts are as asserted. *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993), remanded on other grounds 447 Mich 984 (1994).

The sentencing court must respond to a challenge to the presentence report, but has wide latitude in how it responds. *Spanke, supra*. It may determine whether the information is accurate, accept the defendant’s version, or disregard the challenged information. *Id.* If the court chooses to disregard the information, it must indicate on the record that it did not consider the information in determining the defendant’s sentence. If the court finds the information is irrelevant or inaccurate, the presentence report shall be amended and the inaccurate or irrelevant information must be stricken. MCL 771.14(6); *Spanke, supra* at 649.

Defendant did not challenge the accuracy of the information in the presentence report regarding the first-degree CSC charge. Rather, he objected to its inclusion simply because he was acquitted of the charge. The information was not irrelevant or inaccurate. It was supported by the victim’s trial testimony and was one of charges on which defendant was tried. Therefore, the trial court did not abuse its discretion in rejecting defendant’s challenge.

Defendant did not challenge the accuracy of the information in the presentence report regarding an unrelated and apparently unsubstantiated CSC complaint but did challenge its relevancy. The trial court did not resolve the challenge, noting only that the information would not be deleted if it was accurate. Therefore, a remand for correction of the presentence report is appropriate. MCL 771.14(6); *Spanke, supra* at 650. Given, however, that the court was aware that the claim was never resolved and defendant was never charged, that the court’s reasons for the sentence imposed indicate that it did not consider this information in passing sentence and that defendant does not claim that his sentence, which was within the judicial guidelines, was disproportionate, a remand for resentencing “would be a waste of judicial resources.” *People v McAllister*, 241 Mich App 466, 474; 616 NW2d 203 (2000), remanded on other grounds 465 Mich 884 (2001).

Defendant’s conviction and the length of his sentence are affirmed but the matter is remanded for correction of the presentence report. Jurisdiction is not retained.

/s/ Joel P. Hoekstra

/s/ Mark J. Cavanagh

/s/ Stephen L. Borrello